

Original

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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DEC - 4 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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FCC 02-201

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Amendment of Section 73.202(b),  
Table of Allotments, FM Broadcast Stations  
(Anniston and Ashland, **AL**, College Park,  
Covington, and Milledgeville, Georgia)

)

MM Docket No. 98-112

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RM-9027

)

RM-9268

)

RM-9384

To: The Commission

**THIRD MOTION FOR LEAVE TO FILE SUPPLEMENT**

**PRESTON W. SMALL  
Timothy E. Welch, Esq.  
Hill and Welch  
1330 New Hampshire Ave., N.W. #113  
Washington, D.C. 20036  
(202) 775-0070  
(202) 775-9026 (FAX)  
welchlaw@earthlink.net**

DEC 4 2002

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**December 4, 2002**

Preston W. Small (Mr. Small), by his attorney, hereby seeks leave to submit additional information concerning WNNX LICO, Inc.'s (WNNX) role in the making of civil threats against Mr. Small if he filed additional papers to assert his rights in the instant proceeding. In support whereof, the following is respectfully submitted:

1) Section D of Mr. Small's September 3, 2002 *Petition for Reconsideration* reported that Mr. Small had been threatened with a civil suit if he continued to assert his litigation rights before the Commission in the instant proceeding. WNNX's November 8, 2002 *Consolidated Opposition*, ¶¶ 6-7, denies any involvement in the threats or in the filing of the suit; the denial is not supported by affidavit. WNNX's attorney claims that

there cannot be an *abuse* [of the Commission's processes] unless there is a *use* of a Commission process. . . . WNNX states unequivocally that it is not a party to or authorized any threats against Mr. Small. . . . Mr. Small's accusations are irresponsible, inflammatory, **libelous** and an act of desperation . . . . WNNX's counsel has played no role in any legal proceedings involving Small other to act as WNNX's counsel in this proceeding,<sup>2</sup> and. . . neither WNNX nor WNNX's counsel has any information about the civil action other than what is in the public record.

*Id.* (italics by WNNX, bold by Mr. Small).

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<sup>1</sup> Mr. Small has filed two other motions for leave to file supplements. WNNX responded to both supplements in its opposition during the normal pleading cycle. Because WNNX has responded to the supplements in the usual course of this proceeding, Commission consideration of the supplements is appropriate. First, on September 3, 2002 Mr. Small sought leave to file information concerning the actual filing of the civil suit against him in a Georgia federal court. Section D of Mr. Small's September 3, 2002 *Petition for Reconsideration* reported that Mr. Small had been threatened with a civil suit if he continued to protect his rights before the Commission in the instant proceeding. WNNX's November 8, 2002 *Consolidated Opposition*, ¶¶ 6-7, denies any involvement in the threats or in the filing of the suit, although the denial is not supported by any affidavits. Second, on October 30, 2002 Mr. Small sought leave to supplement the record with evidence that WNNX/RSI/Cox had violated the *ex parte* rules by attacking Mr. Small's interests in another rulemaking proceeding, MM Docket 01-104. WNNX's November 8, 2002 *Consolidated Opposition*, ¶¶ 8-10, argues that there was no *ex parte* violation.

<sup>2</sup> This is a false statement, of course, because it is clear that on October 9, 2002 WNNX's counsel filed a *Petition for Reconsideration* in MM Docket 01-104 which attacked Mr. Small's interests in the instant proceeding and counsel failed to serve Mr. Small with a copy of those offensive comments in violation of the *ex parte* rules.

2) On November 21, 2002 Cox Radio, Inc.'s counsel and WNNX/RSI's shared counsel filed a *Reply* in MM Docket 01-104 which, *inter alia*, states that Mr. Small's raising of a misrepresentation issue against WNNX/Cox/RSI "is deliberately erroneous, **libelous**, and sanctionable. This would be a matter to be pursued by either WNNX or the Commission on its own motion." *Reply*, MM Docket 01-104, ¶ 6 (emphasis added). In the same *Reply* pleading, at n. 3, Cox/RSI/WNNX assert again that Mr. Small's raising issues is "**libelous.**" (Emphasis added).

3) Because the Commission does not adjudicate libel claims the only purpose opponents have for asserting libel claims in documents filed with the Commission is to threaten Mr. Small with civil liability if he pursues his case before the Commission. While counsel to WNNX denies involvement in the civil threats made against Mr. Small discussed in Section D of Mr. Small's *Petition for Reconsideration*, making threats of retaliatory civil litigation in an effort to ward off regulatory pressure is a tactic frequently employed by WNNX's counsel against Mr. Small. In two Commission proceedings opposing counsel utilizes threats of civil liability which are intended to dissuade Mr. Small from pursuing his claims before the Commission and WNNX's counsel has established a pattern of making civil litigation threats.'

4) Because WNNX's counsel has repeatedly asserted threats of civil liability against Mr. Small in two separate Commission proceedings, the Commission cannot accept, at face value,

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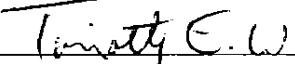
<sup>1</sup> "Libel is defined as a publication, expressed in printing or writing or by symbols or pictures, concerning a living person which is false and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy or shame." *Glendora v. Kofalt*, 162 Misc. 2d 166, 175; 616 N.Y.S.2d 138, 144 (Sup. Ct. NY 1994) (internal quotes omitted). It is frivolous to suggest that information filed in a Commission rulemaking proceeding has subjected any of the opposing corporations to "public hatred, contempt, scorn, obloquy or shame" even if the allegations were false, which they are not. WNNX and the others have repeatedly claimed that Mr. Small, someone who undoubtedly qualifies as a "living person" unlike our corporate opponents, has abused the Commission's rules, filed frivolous pleadings, engaged in contemptuous conduct, impermissibly obstructed Commission proceedings, impermissibly interposed delay, etc. The opposing parties' concern about being libeled after writing those statements is inane. Regardless, the point is that WNNX, and the others, utilize the artifice of making threats of civil action to further their regulatory objectives.

opposing counsel's word that WNNX had nothing to do with the threats which were made against Mr. Small and which are complained of in Section D of the *Petition for Reconsideration* nor can the Commission accept counsel's assertion that WNNX had nothing to do with the filing of the civil suit discussed in the September 3, 2002 *Motion for Leave to File Supplement*. WNNX's practice is to assert threats of civil liability when presented with regulatory opposition and the record contradicts WNNX's counsel's unsupported assertion that WNNX did not participate or have prior knowledge of the threats of civil litigation discussed in Section D of Mr. Small's *Petition for Reconsideration*.

WHEREFORE, it is respectfully submitted that the Commission investigate whether WNNX and its counsel had any role in the civil threats made against Mr. Small or any role in the filing of the civil suit against Mr. Small

Hill & Welch  
1330 New Hampshire Ave., N.W. #113  
Washington, D.C. 20036  
(202) 775-0070  
(202) 775-9026 (FAX)  
welchlaw@earthlink.net  
December 4, 2002

Respectfully submitted,  
PRESTON W. SMALL

  
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Timothy E. Welch  
His Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 4<sup>th</sup> day of December 2002 served a copy of the foregoing THIRD MOTION FOR LEAVE TO FILE SUPPLEMENT by First-class United States mail, postage prepaid, upon the following:

Mark N. Lipp  
Erwin G. Krasnow  
Shook, Hardy and Bacon  
600 14<sup>th</sup> Street, N.W. Suite 800  
Washington, D.C. 20005-2004  
Counsel to WNNX and RSI

Kevin F. Reed  
Elizabeth A. M. McFadden  
Nam E. Kim  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Ave., N.W. #800  
Washington, D.C. 20036  
Counsel to Cox

Auburn Network, Inc.  
c/o Lee G. Petro  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900 East Tower  
Washington, D.C. 20005

Marengo Broadcast Association  
5256 Valleybrook Trace  
Birmingham, AL 35244

Dale Broadcasting, Inc.  
P.O. Box 909  
Alexander City, AL 35051

Mark Blacknell  
Womble Carlyle Sandridge & Rice  
1401 Eye Street, N.W. # 700  
Washington D.C. 20005

Williamson Broadcasting, Inc.  
702 East Battle Street, Suite A  
Talladega, AL 35161


Scott Communications, Inc.  
273 Persimmon Tree Road  
Selma, AL 36701

Southeastern Broadcasting Co  
P.O. Box 1820  
Clanton, AL 35045

Dan J. Alpert  
2120 N. 21<sup>st</sup> Road  
Arlington, VA 22201

Joan Reynolds  
Brantley Broadcast Associates  
415 North College Street  
Greenville, AL 36037

James R. Bayes  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

  
Timothy E. Welch